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OFFICE OF THE CLERK

In The Supreme Court of the United States

BONNIE HARBUCK,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

Bonnie Harbuck
Post Office Box 7126
Warner Robins, Georgia 31095
(478) 953-7229

Petitioner Pro Se

THE LEX GROUP^{DC} ♦ 1750 K Street, NW ♦ Suite 475 ♦ Washington, DC 20006
(202) 955-0001 ♦ (800) 815-3791 ♦ Fax: (202) 955-0022 ♦ www.thelexgroupdc.com

QUESTIONS PRESENTED

1. Whether gender discrimination is a legal conclusion or a fact?

2. Whether if some but not all of the operative facts are the same, does 28 U.S.C. § 1500 trigger or apply?

3. Whether partially transferred cases create an unfairness exception?

4. Whether the Keene Corp. v. United States, 508 U.S. 200, 210, 124 L. Ed. 2d 118, 113 S. Ct. 2035 (1993) opinion is in conflict with partially transferred cases under 28 U.S.C. § 1500 and 28 U.S.C. § 1631 and still viable case law?

5. Whether 28 U.S.C. § 1500 precludes transferring jurisdictional claims via 28 U.S.C. § 1631 until the other claims from the same suit are adjudicated?

6. Whether in the interest of fairness and justice, a mandate should issue, stating that a court should transfer a case back to the transferring forum with the express direction for the transferring forum to retransfer the case back to the appropriate forum after all other claims are adjudicated without retriggering 28 U.S.C. § 1500?

7. Whether 28 U.S.C. § 1631 and 28 U.S.C. § 1500 are in direct conflict in transferring partial claims, thus violating Equal Protection or Due Process Rights of the Fifth and Fourteenth Amendments?

RULE 29.6 STATEMENT AND INTERESTED PERSONS

Pursuant to Supreme Court Rule 29.6, petitioner states that it has no parent companies or non-wholly owned subsidiaries.

The following persons have an interest in the outcome of this litigation:
Bonnie Harbuck, United States.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit appears at the Appendix to the petition and is published. The opinion of the United States Court of Federal Claims appears at the Appendix to the petition and is published at 58 Fed. Cl. 266 (2003). The opinion of the United States District Court for the Middle District of Georgia, Macon Division appear at the Appendix to the petition.

JURISDICTION

The court of appeals' judgment was decided on August 10, 2004. A timely request for a combined petition for rehearing and petition for rehearing en banc was denied on October 15, 2004. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1631 provides: "Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the

action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred."

28 U.S.C. § 1500 provides: "The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States."

The Fifth Amendment to the constitution provides that a person will not "be deprived of life, liberty, or property, without due process of law."

The Fourteenth Amendment to the constitution provides in pertinent part that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

Bonnie Harbuck has never had her Equal Pay Act Claim heard on its merits before any court. In 1988, Harbuck assumed the duties of a male employee yet received no compensation for the assumption of his

duties. The pay disparity amounted to a difference of $10 per hour between wages paid to the female employee and wages paid to the male employee. During 1988 to the present, Harbuck asked her supervisors to remedy her wage disparity for the assumption of the male's duties. Management refused. During this time frame, Harbuck also sought promotions for other positions, but was not selected.

Harbuck filed an EEO complaint regarding the non-selection for other positions. The EEO complaint and the Equal Pay Act Claim were combined into one lawsuit filed by Harbuck's then attorney, Adam Conti.

The government raised jurisdictional arguments against the Equal Pay Act Claim, stating that the claim should be dismissed for being in the wrong forum. Prior to the completion of discovery, Harbuck obtained a new lawyer, who moved to transfer the Equal Pay Act Claim to avoid its dismissal.

The District Court transferred the claim to the Federal Court of Claims. The government again raised a jurisdictional argument alleging improper jurisdiction, and the Federal Court of Claims dismissed the claim instead of transferring the claim back to the Middle District of Georgia, or allowing the claim to proceed once the District Court adjudicated the other claims.

REASONS FOR GRANTING THE PETITION

The Federal Circuit Court of Appeals erred in classifying gender discrimination as a fact rather than as a legal conclusion based on facts.

Black's Law Dictionary defines discrimination as "the effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion, or handicap." Is gender discrimination a legal conclusion or a fact when determining claims that require analysis under § 1500? This question centers on only one key same fact: the fact that Harbuck is a female.

The Equal Pay Act is a strict liability claim. The basis of the claim is wages not gender discrimination. The wage disparity does not have to be gender discrimination to survive, but merely a disparity in the wages between a man and a woman. The Federal Circuit Opinion characterizes facts in the form of a legal conclusion. Here, the facts do not preempt the claim from the jurisdiction of the court because the facts are not the same. If the outcome turns on the characterization of any of these elements, then the case should be remanded for further amplification, discovery, and trial.

In Loveladies Harbor Inc. v. United States, 27 F.3d 1545 (Fed. Cir. 1994 en banc) it was not decided whether if some but not all of the operative facts are the same, if § 1500 was triggered.

If some of the facts are the same, then § 1500 should not be triggered. Here the only fact that was the same was that Harbuck was a female.

Since the only same operative fact, if there is one same operative fact in this case, is the fact that Harbuck is a female, then the question to the court is does that trigger § 1500 analysis?

Or are the facts even the same at all, but merely interrelated in their reference to gender discrimination? No, for purposes of § 1500, being female is not the triggering analysis. The Federal Circuit erred in making this assertion, and establishing this sweeping case law in regards to gender for § 1500 claims. Being female is a not a specific enough fact to trigger the arbitrary dismissal of the case.

Partially transferred cases necessitate the need for a judicially created unfairness exception.

The Loveladies Harbor Inc. v. United States, 27 F.3d 1545 (Fed. Cir. 1994 en banc) opinion is cited for operative facts as distinguishing under § 1500. Yet it is the Loveladies opinion that allows Harbuck the justice she seeks in this case. In the Loveladies case, this court interpreted the District Court Complaint and the Federal Court of Claims Complaint as to what this court perceived that the plaintiffs indeed had intended if they had "framed their pleadings with more precision." Loveladies at 1554. If there were any doubt as to what the majority opinion in Loveladies meant in framing the pleadings with precision, then the dissent in Loveladies further clarifies what the majority

did in the Loveladies opinion: "ignore the words of the two complaints...and instead substitute its understanding of what Loveladies must have intended by the several suits." Loveladies at 1559. Loveladies in essence created an exception for fairness by allowing the court to substitute the court's own understanding of the two complaints.

Transfers of partial complaints bring a special set of problems to litigants.

Obviously, if the litigants had 20/20 hindsight they would have originally drafted both complaints with precision to avoid ambiguity. But in transfer cases of partial complaints, as in this case, the time for amending pleadings to clarify confusion and ambiguity has often time expired at the District Court Level.

Per the opinion in Loveladies, the court is free to substitute the words of the complaint for the bigger picture for what the litigants intended in the complaints if they had the opportunity for hindsight. This of course, creates a sense of fairness for the parties.

The court should issue a precedent setting a fairness or unfairness exception in transfer cases or partially transferred cases which would mandate the court to substitute or interpret the pleadings in transfer cases in the light most favorable to the transferring party in the interest of justice and fairness, or to retransfer the case back to the transferring forum pending adjudication of the other claims.

A precedent is needed to remedy the current problem for litigants. The Dico, Inc. v. United States, 48 F.3d 1199 (Fed. Cir. 1995) case is distinguishable from the present case in that it is not a transfer case. In Dico, there are two cases in two different courts from the initial pleadings, not a transfer from one court to another. Because the Dico case is not a transfer of part of the complaint, then its holding of specificity of pleadings is not relevant in this case. The litigants in Dico did have the responsibility to plead with specificity. Yet, when the case involves a partial transfer of part of the complaint from another court, fairness mandates a more liberal interpretation of the two complaints, consistent with the Loveladies approach. The Loveladies opinion is reconciled with the Dico opinion for the precedent sought in that the Dico case was not a transfer case.

Here, Harbuck seeks fairness from the court in interpreting her two complaints. She seeks the court substitute what was intended and ignore some duplicative words in the two complaints since part of the case was transferred after the time for amending the pleadings in District Court had expired. A court substitution or fair interpretation of the pleadings allows the court to make the substitution, and allows Harbuck's claim to proceed because any ambiguity regarding the pleadings is construed regarding the distinct claims. The court doesn't change any facts; it merely reads the complaints in a fair way given the fact that the complaints were originally one combined complaint. This interpretation of the pleadings is a fairer method for all litigants who potentially have this problem if they have two cases at the same time.

Alternatively, the court could have in the interest of justice or fairness, sua sponte transferred the case back to the transferring forum with the express direction for the transferring forum to retransfer the case back to the appropriate forum after all other claims were adjudicated.

Keene is in conflict with § 1500 and transferred claims pursuant to § 1631.

The claim was transferred pursuant to § 1631, but per § 1500 jurisdiction is now invalid. This creates a conflict with the two statutes per the current case law. The Keene Corp. v. United States, 508 U.S. 200, 210, 124 L. Ed. 2d 118, 113 S. Ct. 2035 (1993) opinion could have affirmed that all judicial exceptions to § 1500 be removed. Yet the opinion revived those previous exceptions overruled in UNR Indus. Inc. v. United States, 962 F.2d 1013 (Fed. Cir. 1992 En Banc). Exceptions are created out of fairness. As the Keene opinion noted: "in applying § 1500 to the facts of this case, we find it unnecessary to consider much less repudiate the 'judicially created exceptions' to § 1500 found in Techon Engineers, Casman, and Boston Five. Keene at 215.

Claims that are not the same but that are interrelated should not be precluded from adjudication by the courts. The courts are free to interpret cases and create exceptions in the name of justice while still leaving the statute intact. The spirit of the statute is still upheld. The Keene opinion is in conflict with § 1631.

In the Title VII Claim, Harbuck sought monetary damages for not receiving a promotion for a WG-12 circuit board position. Even though her complaint is not clear regarding that claim, her EEO Complaint is clear and the District Court is bound by the EEO Complaint. Harbuck's EEO Complaint did not include an unequal wage claim for the GS-11 position. The District Court never adjudicated any allegation regarding equal pay for equal work because such a claim was not in the EEO Complaint. There were two separate incidents based on sex, one of which was included in the Title VII complaint, the other that was not included. Here, the opinion in Keene provides a conflict not only for Harbuck but other litigants with two claims.

Both 28 U.S.C. § 1500 and Keene should be reviewed for continued relevancy, fairness, and constitutionality by today's modern standards.

The District Court never adjudicated equal pay or comparable work corresponding to Harbuck's male counterpart. The District Court Complaint contained language that the District Court had no authority to adjudicate, ie: paying male employees who perform work that is substantially comparable to Plaintiffs at a higher level than Plaintiff. The remedy of Back Pay goes exclusively to unequal wages for the GS position not for non-selection for the WG position. Harbuck does not distinguish the claims that she seeks in her District Court Complaint. A fair reading of the remedy of the complaint can be for back pay for the Equal Pay Act Claim rather than for the Title VII Claim.

There are ambiguities in Harbuck's complaints. Yet, the two complaints do not have to be read strictly and literally for partial transfer cases. Such a harsh result can result for litigants in partially transferred cases. Indeed the statute does not require a strict and literal reading. To comply with § 1500, one merely has to follow the statute. The facts of both Harbuck's cases are interrelated but not the same.

Harbuck's problem is easily duplicated by other litigants seeking redress from the federal government; and is thus in the public interest to review.

The Federal Court of Claims stated:

> The Plaintiff argues that certain facts in her original complaint applied to the Title VII claims, whereas others applied to the EPA claims. All facts, plaintiff avers, had to be included in the original complaint filed with this court by the rules of transfer, but an amended complaint has cured the duplication. Plaintiff contends that the EPA claim at issue is not merely a subset of the facts at issue in the District Court, but that certain facts and claims have been carved out of her original suit and transferred here. Despite plaintiff's assertion, however, the operative facts of both the case filed in this court and the case filed in the District Court are overlapping. No matter how one parses the complaints, the same alleged discrimination on the basis of sex is at the root

of the instant case and at least the Title VII component of the District Court case.

Bonnie Harbuck v. The United States, 58 Fed. Cl. 266; 92 Fair Empl. Prac. Cas. (BNA) 1266 (2003)

A wide range of litigants and their lawyers will potentially also file Title VII and Equal Pay Act Claims in the same claim for judicial economy. Therefore, it is in the public interest to review the problem created by the transfer of cases.

The trial court errs in stating that the operative facts of both claims are the same merely because both claims are rooted on the basis of sex.

This position is incorrect and overstates the underlying purpose of the statute: to avoid duplicitous litigation on the same facts. Both claims revolve around the basis of sex. But both claims do not revolve around the same fact pattern of sex. Harbuck did not do the same work as a WG-12 Circuit Board Inspector; she was not promoted to a WG-12 Circuit Board Inspector Position; she did not plead that she did do the work of a WG-12 Circuit Board Inspector Position. The District Court never adjudicated the equal pay for equal work claim for the GS Position. Because the District Court never adjudicated the issue of equal wages for the GS position, equity, justice, and fairness compel the conclusion Harbuck seeks here: the chance to litigate and adjudicate her unequal wages for equal work of the GS position.

This position is also easily duplicated by numerous employment litigants and needs further clarification and review by this court.

The policy arguments made in Keene and which are quoted against Harbuck are inapplicable to transferred cases under 28 U.S.C. § 1631 and in the public interest to review.

The policy arguments of Keene are not regarding judicial exceptions. Those policy arguments are of redrafting the statute by the court to include language to make the statute less anachronistic, and that the statute has never really performed the preclusion function emphasized by the statute's sponsor. Keene at 215. In fact, the judicial exceptions were affirmed in Keene, showing that the non-policy argument of the last paragraph of Keene's opinion is not regarding those judicial exceptions, but merely those who take offense or except to the statute as a whole should take it up with Congress. It does not preclude the court from exercising its discretion in formulating exceptions and it still allows the court to enforce the statute.

Keene needs review for applicability for a broad range of cases under 28 U.S.C. § 1631 and 28 U.S.C. § 1500.

§ 1500 precludes transferring claims via § 1631 until the other claims are adjudicated or dismissed.

Bonnie Harbuck has never had her claim on the GS Position of unequal wages litigated. The claim was included in the District Court Complaint and later

transferred to the Federal Court of Claims. Had Harbuck the benefit of hindsight she would have drafted the complaints clearer with the two courts: but the complaints were originally drafted and intended as merely one complaint. Per United States v. County of Cook, 170 F.3d 1084 (1999) § 1631 was designed to promote policies to remedy situations when litigants mistakenly file an action in a court that lacks jurisdiction. In Cook, transfer orders for partial claims pursuant to § 1631 were transferred back to district court because § 1500 precluded the Federal Court of Claims' jurisdiction over those claims at that time. At the time Harbuck's Equal Pay Act Claim was transferred pursuant to § 1631 jurisdiction was not allowed pursuant to § 1500.

The Equal Pay Act Claim should not have been transferred until the case was adjudicated in District Court on the other non-related claims, or the Federal Court of Claims should have transferred jurisdiction back to the District Court until jurisdiction would have been proper in the Federal Court of Claims. This is potentially a recurring problem for all litigants who have more than one claim.

§ 1500 may be archaic and old, but its visages go to separateness.

The fact of Harbuck being female and the legal conclusion of discrimination do not undermine the purpose of the statute if both claims are allowed to proceed. After the civil war, the cotton claimants could not meet the stringent requirements of not aiding or assisting in the rebellion of the Civil War: therefore

the claimants began filing against officers and in other forums. Yet each claim was about the cotton and the compensation for the cotton.

If a Southerner had filed a suit regarding the loss of her cotton from the rebellion, and also a suit regarding her free speech rights against the government in flying the confederate flag over her home after the rebellion, these would be two suits that would arise out of the civil war but would not trigger the statute. Just because one fact or circumstance is the same does not make the statute applicable in all suits.

§ 1631 and § 1500 are in direct conflict denying Equal Protection and Due Process Rights.

Harbuck seeks redress for a wrong committed against her. She is female, yes. But the crux of her complaint is that she was paid less wages: $10 per hour less to be exact since June of 1988. To not allow her claim to proceed merely because she is a female is an injustice of its highest regard. § 1500 is not compromised by interpreting the pleadings in a special way since the complaint was transferred from another court. The only compromise of § 1500 is if Harbuck is not allowed to proceed with her claim to trial.

Litigants are denied equal protection and due process rights to pursue an Equal Pay Act Claim against the government by the conflict of these two statutes. A large portion of employment cases are based on sex based discrimination; therefore this case is relevant to a large portion of both employment and federal employment cases.

§ 1500 is unconstitutional, denying rights of redress to a broad range of litigants.

28 U.S.C. § 1500 is unconstitutional in that is denies parties the right of redress if a claim against the government is filed in the wrong forum. Other claims are allowed liberal transfer, yet per the language of § 1500 the parties are denied of any type of redress. This flies in the face of all jurisprudence. We always allow parties to amend complaints and fix mistakes. Yet, § 1500 by its current application unconstitutionally denies the same liberal transfer and remedial remedies to cure jurisdictional defects provided to other litigants.

"Because suits against the United States may be brought in the district courts in some circumstances and in the Court of Federal Claims in other circumstances, it is likely that some litigants will mistakenly file some claims in the court that lacks jurisdiction; Section 1631 was clearly intended by Congress to remedy this problem through the simple mechanism of transfer to the court of proper jurisdiction." United States v. County of Cook, 170 F.3d 1084 (1999). Yet, § 1500 unconstitutionally deprives litigants of the mechanism to fix the errors or mistakes clearly intended by Congress' passage of § 1631. Therefore, § 1500 deprives partially transferred case litigants of their rights for redress. The statutes are in direct conflict for a broad section of litigants who file claims against the United States.

Litigants have a property right in their claims for redress. To deprive litigants of any redress unfairly

denies litigants their constitutional rights to due process and equal protection. § 1631 allows litigants to fix their mistakes, only for § 1500 to unconstitutionally deprive litigants of that right.

As it currently stands, once a claim is filed in the wrong forum with other claims against the government, the mistake cannot be fixed. Even though § 1631 grants a litigant the right to fix the problem by transferring---the transfer does not fix the problem. The claim, when transferred, is still deemed filed the same time as the other claims triggering dismissal under § 1500. The dismissal deprives the litigant of her basic constitutional rights.

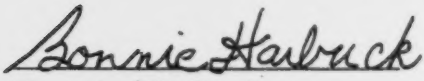
It is in the public interest and of broad reaching concern to review the constitutionality and fairness of these statutes and current case opinions.

CONCLUSION

The petition for a writ of certiorari should be granted. 28 U.S.C. § 1500 is an antiquated statute from the civil war that is in direct conflict with another statute 28 U.S.C. § 1631, thus depriving constitutional rights. These laws need further clarification from this Court as to the appropriate interpretation and remedy in cases against the government originally filed in the same forum.

Further, the previous holding in Keene is now ripe for review.

Respectfully submitted,



Bonnie Harbuck
P.O. Box 7126
Warner Robins, GA 31095

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United States Court of Appeals for the Federal Circuit

04-5013

BONNIE HARBUCK,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Bonnie Michelle Smith, of Bonaire, Georgia, argued for plaintiff-appellant.

William F. Ryan, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee. With him on the brief were Peter D. Keisler, Assistant Attorney General; and David M. Cohen, Director. Of counsel on the brief was Lieutenant Colonel Paula J. DeMuth, United States Department of the Air Force, Air Force Legal Services Agency, General Litigation Division, of Arlington, Virginia.

Appealed from: United States Court of Federal Claims

Senior Judge Bohdan A. Futey

United States Court of Appeals for the Federal Circuit

04-5013

BONNIE HARBUCK,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

DECIDED: August 10, 2004

Before LOURIE, Circuit Judge, FRIEDMAN, Senior Circuit Judge, and PROST, Circuit Judge.

FRIEDMAN, Senior Circuit Judge.

Section 1500 of Title 28 of the United States Code denies the Court of Federal Claims jurisdiction over "any claims" with respect to which the plaintiff "has pending in any other court any suit . . . against the United States." The district court transferred one count of a complaint to the Court of Federal Claims. Under the transfer statute, 28 U.S.C. § 1631 (2000), the claims in the Court of Federal Claims are deemed to have been filed on the same date as the plaintiff filed her district court suit. The Court of Federal Claims dismissed the suit before it for lack of jurisdiction

under § 1500 because the remaining claim in the district court suit was the "same claim" as that before it. We affirm.

I

In February 2001 the appellant Bonnie Harbuck filed suit in the United States District Court for the Middle District of Georgia against the Secretary of the Air Force alleging sex discrimination in her employment with the Air Force. The first amended complaint contained three counts. Count I alleged that, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, 2000e-1 to 2000e-17, the Air Force had "discriminated against Plaintiff on the basis of her sex" by, among other things, "[p]aying male employees who perform work that is substantially comparable to Plaintiffs [sic] at a higher level than Plaintiff;""[f]ailing to advance Plaintiff to the WG-12 or GS-11 level as it did with her male counterparts;""[i]mpeding Plaintiff's career advancement by giving her lower performance appraisals than it gave her male coworkers, withholding accolades she had earned, failing to properly evaluate her experience and accomplishments, following a practice of favoring male employees over female employees for promotion; and threatening and intimidating Plaintiff." First Am. Compl. 50. Count II charged that the Air Force had willfully violated the Equal Pay Act of 1963, 29 U.S.C. § 206(d), "[b]y paying male employees at a higher rate for work which requires equal skill, effort, and responsibility and which is performed under similar working conditions to that performed by Plaintiff."

First Am. Compl. 52. Count III charged violation of the Privacy Act of 1974, 5 U.S.C. § 552a.

The complaint sought declaratory, injunctive and monetary relief. It sought a declaration that "Defendant has discriminated against Plaintiff on the basis of her sex in violation of Title VII of the Civil Rights Act of 1964, by affording males and younger persons opportunities for advancement not afforded to her, by paying males [sic] employees at a higher rate more than her [sic] based on her sex, by following a pattern of favoring male employees over female employees for career advancement opportunities and by making adverse and derogatory statements based on Plaintiff's sex," and that "the Defendant has willfully violated the Equal Pay Act by paying Plaintiff less than it paid her male counterparts for work which requires equal skill, effort, and responsibility and which is performed under similar working conditions." The injunctive relief sought included reclassifying Harbuck to a higher grade. The first item of damages sought was "back wages in the amount of the difference between what she actually earned and what she would have earned at the GS-12 level from January 1990 until she is restored to her proper and correct grade."

Approximately a year later Harbuck, represented by new counsel, moved to transfer the Equal Pay Act Count (Count II) to the Court of Federal Claims. The district court granted the motion. It held that because Harbuck was seeking damages of more than $10,000 in that count, it had no jurisdiction over it and that "it is in the interest of justice" to transfer it to the Court of Federal Claims, which would have

jurisdiction over "Petitioner's EPA claim as pleaded." Order of Aug. 5, 2002.

Following the transfer of Count II, Harbuck filed in the Court of Federal Claims a complaint under the Equal Pay Act. The complaint reiterated the allegations in Count II of the district court complaint. It alleged that the Air Force violated the Equal Pay Act "[b]y paying male employees, specifically Jerry Walker[,] a GS-11, at a higher rate for work which requires equal skill, effort, and responsibility and which is performed under similar working conditions to that performed by Plaintiff." Compl. 42. The relief requested included a declaration that "Defendant has willfully violated and retaliated against the Plaintiff in violation of the Equal Pay Act by paying Plaintiff less than it paid her male counterpart, specifically the duties she assumed from male employee, Jerry Walker, GS-11, for work which requires equal skill, effort, and responsibility and which is performed under similar working conditions," the reclassification of Harbuck to a higher grade, and "back wages in the amount of the difference between what she actually earned and what she would have earned at the GS-12 level from January 1990 until she is restored to her proper and correct grade." Id.

Some months later the district court dismissed the remainder of Harbuck's complaint.

On the government's motion, the Court of Federal Claims then dismissed the complaint for lack of jurisdiction. Harbuck v. United States, 58 Fed. Cl. 266 (2003). The court held that Harbuck's claim before it was the "same claim" as her claim in the district court

and that § 1500 therefore precluded the Court of Federal Claims from considering her suit. Id. at 269-70.

II

A. Section 1500 of Title 28 provides:

> The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

This is an old statute whose ancestry goes back to the aftermath of the Civil War. See Keene Corp. v. United States, 508 U.S. 200, 206-07 (1993). Its purpose was to "force plaintiffs to choose between pursuing their claims in the Court of Claims or in another court" and to prevent the United States from having to litigate and defend against the same claim in both courts. UNR Indus. v. United States, 962 F.2d 1013, 1018, 1021 (Fed. Cir. 1992) (in banc). "The question of whether another claim is 'pending' for purposes of § 1500 is determined at the time at which the suit in the Court of Federal Claims is filed, not the time at which the Government moves to dismiss the action." Loveladies Harbor, Inc. v. United States, 27 F.3d 1545, 1548 (Fed. Cir. 1994) (in banc). Thus, the district court's dismissal of the remaining counts, after it had transferred Count II to the Court of Federal Claims, was irrelevant to the

validity under § 1500 of the latter court's subsequent dismissal of that count.

The statute pursuant to which the district court transferred Count II of the complaint to the Court of Federal Claims was 28 U.S.C. § 1631, which provides that "[w]henever a civil action is filed in a court . . . and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action . . . to any other such court in which the action . . . could have been brought at the time it was filed." That provision further provides that following such transfer, "the action . . . shall proceed as if it had been filed in . . . the court to which it is transferred on the date upon which it was actually filed in . . . the court from which it is transferred." Id. This statute permits the transfer not only of the entire case but of separate claims in the action. United States v. County of Cook, Ill., 170 F.3d 1084, 1087-89 (Fed. Cir. 1999). Thus, under § 1631, Harbuck's Equal Pay Act claim was deemed filed in the Court of Federal Claims on the same day on which she originally filed that claim as one of the three counts of her district court complaint.

"[T]he 'filing' of the same claim simultaneously in the district court and the Court of Federal Claims by operation of § 1631 deprives the latter court of jurisdiction pursuant to § 1500." Id. at 1091. The critical issue in the case, therefore, is whether Harbuck's Equal Pay Act claim in the Court of Federal Claims was the "same claim" as her Title VII claim in the district court. "Deciding if the claims are the same or distinctly different requires a comparison between the claims raised in the Court of Federal Claims and in the other

lawsuit." Loveladies Harbor, Inc., 27 F.3d at 1549 (internal quotation marks omitted).

B. "For the Court of Federal Claims to be precluded from hearing a claim under § 1500, the claim pending in another court must arise from the same operative facts, and must seek the same relief." Id. at 1551. We agree with the Court of Federal Claims that both of those requirements are met here.

Harbuck's Federal Claims Equal Pay Act claim and her district court Title VII claim both arose out of the same operative facts: the Air Force's alleged sexual discrimination by payment of lesser compensation to women than to men for the same or substantially equal work. As noted, her Equal Pay Act claim alleged that the Air Force had violated that Act "[b]y paying male employees, specifically Jerry Walker[,] a GS-11, at a higher rate for work which requires equal skill, effort, and responsibility and which is performed under similar working conditions to that performed by Plaintiff" and "by paying Plaintiff less than it paid her male counterpart, specifically the duties she assumed from male employee, Jerry Walker, GS-11, for work which requires equal skill, effort, and responsibility and which is performed under similar working conditions." Her district court Title VII claim alleged that the Air Force had "discriminated against Plaintiff on the basis of her sex . . . by," among other things, "[p]aying male employees who perform work that is substantially comparable to Plaintiffs [sic] at a higher level than Plaintiff,""[f]ailing to advance Plaintiff to the WG-12 or GS-11 level as it did with her male counterparts," and "following a practice of favoring

male employees over female employees for promotion."

Harbuck argues, however, that the two suits involved different claims because the Title VII complaint "centered on" her non-selection for promotion, and the Equal Employment Act claim "centered around" her "assuming the position of a male employee . . . and not receiving the same pay." Appellant's Br. at 6. "Deciding if the claims are the same or distinctly different requires a comparison between the claims raised in the Court of Federal Claims and in the other lawsuit." Loveladies Harbor, Inc., 27 F.3d at 1549 (internal quotation marks omitted). "[I]t is 'operative facts' and not legal theories by which claims may be distinguished under § 1500 when the same relief - money damages - is sought." Id. "Claims are the same where they arise from the same operative facts even if the operative facts support different legal theories which cannot all be brought in one court." Johns-Manville Corp. v. United States, 855 F.2d 1556, 1567 (Fed. Cir. 1988). The difference between the two theories upon which she relies are but different manifestations of the same underlying claim that the Air Force discriminated against women by paying them less than men.

Both claims also "seek the same relief": money damages. The Equal Pay Act complaint sought, in addition to other formulations of damages, "back wages in the amount of the difference between what she actually earned and what she would have earned at the GS-12 level from January 1990 until she is restored

to her proper and correct grade." This is identical to one of the prayers for relief in the first amended district court complaint. No more is required to trigger the second bar under § 1500.

The inclusion of other and different requested relief in the two complaints does not avoid the application of that provision. Keene Corp., 508 U.S. at 212 (holding that §1500 applies if "there [is] some overlap in the relief requested"). As long as the same relief is sought in both cases - here money damages - the second prong of the § 1500 requirement that the "same relief" be involved in both cases is satisfied. Cf. Johns-Manville, 855 F.2d at 1566 (distinguishing the situation before it, where "the relief sought from both courts is money, but under different theories," from one in which "a different type of relief is sought in the district court (equitable) from that sought in the Court of Claims (money)"); Loveladies Harbor, Inc., 27 F.3d at 1551, 1556 (holding § 1500 inapplicable because the Court of Federal Claims complaint sought only money damages and the district court complaint sought only equitable relief).

C. Finally, Harbuck contends that a "manifest injustice" would result if she were not able to pursue her Federal Claims Court case.

She seeks succor from the district court's ruling that transfer of her Equal Pay Act claim would be "in the interest of justice" and suggests that it also would be in such interest to allow her Court of Federal Claims case to continue. The "interest of justice" element under §

1631, however, relates solely to the transfer of a case. It does not affect or inform the Court of Federal Claim's determination whether § 1500 ousts it of jurisdiction because the "same claim" is pending in another court.

Harbuck's problem is largely of her own making. As she recognizes, she could and should initially have filed her Equal Pay Act case in the Court of Federal Claims. She states that it was her "former counsel" who "did not file the Equal Pay Act Claim in the proper forum." Appellant's Br. at 10. Indeed, in her brief she refers several times to her former counsel's mistakes. Unfortunately for her, however, she is bound by the actions of her former counsel. See Link v. Wabash R.R., 370 U.S. 626, 634 (1962) (Under "our system of representative litigation . . . each party is deemed bound by the acts of his lawyer-agent.").

In any event, we would have no authority to create an "unfairness" exception to the unequivocal language of § 1500. Any change in the scope of or exception to that statute is for Congress, and not this court, to make. Our obligation and responsibility is to apply the statute Congress has written. As the Supreme Court stated in Keene Corp., in rejecting the similar argument that "§ 1500 operates in some circumstances to deprive plaintiffs of an opportunity to assert rights that Congress has generally made available to them,"

> the "proper theater" for such arguments, as we told another disappointed claimant many years ago, "is the halls of Congress, for that branch of the government has limited the jurisdiction of the Court of Claims. We enjoy no "liberty to

> add an exception . . . to remove apparent hardship," and therefore enforce the statute.

508 U.S. at 217-18 (citations and footnote omitted).

CONCLUSION

The judgment of the Court of Federal Claims dismissing Harbuck's complaint for lack of jurisdiction is

AFFIRMED.

In the United States Court of Federal Claims

No. 02-1829C

(Filed September 29, 2003)

BONNIE HARBUCK,

Plaintiff

v.

THE UNITED STATES,

Defendant.

Jurisdiction, 28 U.S.C. § 1500; 28 U.S.C. § 1631; Equal Pay Act, 29 U.S.C. § 206

Bonnie Michelle Smith, Bonaire, Georgia, attorney of record for plaintiff.

Michael David Panzera, Department of Justice, Washington, D.C., with whom was ***Assistant Attorney General Peter D. Keisler,*** for defendant. ***David M. Cohen,*** Director, and ***Todd M. Hughes,*** Assistant Director.

Paula Demuth, United States Department of the Air Force, of counsel.

OPINION

Futey, **Judge.**

This civilian pay case comes before the court on defendant's motion to dismiss for lack of subject matter jurisdiction. Plaintiff alleges that she suffered employment-related discrimination on the basis of sex, in violation of the Equal Pay Act of 1963 (EPA), 29 U.S.C. § 206.

On February 27, 2001, plaintiff filed a complaint against the government in the United States District Court for the Middle District of Georgia (District Court), alleging, *inter alia*, the same EPA violation as is involved in the present case. Plaintiff subsequently became aware of this court's EPA jurisdiction and filed a motion to transfer the EPA component of her case. The motion was granted by the District Court on August 6, 2002, and plaintiff filed an amended complaint in this court on December 18, 2002, alleging the EPA violation. The balance of plaintiff's claim, including a count alleging discrimination under Title VII, 42 U.S.C. § 2000e, continued pending in the District Court. On June 19, 2003, the District Court rendered judgment, dismissing certain claims under the Privacy Act, 5 U.S.C. § 552, and ruling in favor of defendant on summary judgment with respect to all other pending claims. The District Court did not rule on plaintiff's EPA claim.

Defendant argues that the complaint must be dismissed because, under 28 U.S.C. § 1500, this court lacks jurisdiction to dispose of a claim that was filed while the same claim was pending in the District Court.

Factual Background

Bonnie Harbuck, plaintiff, was employed by the United States Air Force at the Warner Robins Air Logistic Center, in Houston County, Georgia. She began employment as a Clerk Typist, GS-02, in September 1979, and advanced through increasingly responsible positions until she became an Electronics Mechanic, WG-11, in August 1987. She remained at the WG-11 level until December 3, 2000.[1]

During the period 1988 to 2000, plaintiff assumed a new position and performed duties allegedly equal to a male GS-11 employee. In 1995 plaintiff requested a reclassification to a higher level, but no action was taken. After being allegedly passed over for several promotions, plaintiff made informal allegations of discrimination. On the basis of alleged retaliation, plaintiff filed her complaint in the District Court. Plaintiff's EPA claim in this court is based on the simple allegation that "[w]hen the male employee did the work, he received the wages of a GS-11, but when a female did the work she received [lower] wages of a WG-11."[2]

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1 Plaintiff's Amended Complaint (Amended Compl.) ¶¶ 5-14.

2 Plaintiff's Response To Defendant's Motion To Dismiss (Pl.'s Response) at 8.

Discussion

I. Standard of Review

In ruling on a motion to dismiss for lack of jurisdiction under **RCFC** 12(b)(1), the court must accept as true the complaint's undisputed factual allegations and construe the facts in the light most favorable to plaintiff. ***Scheuer v. Rhodes***, 416 U.S. 232, 236 (1974); ***Hamlet v. United States***, 873 F.2d 1414, 1415 (Fed. Cir. 1989); ***Farmers Grain Co. v. United States***, 29 Fed. Cl. 684, 686 (1993). A plaintiff must only make a prima facie showing of jurisdictional facts through the submitted material in order to avoid a defendant's motion to dismiss. ***Raymark Indus. v. United States***, 15 Cl. Ct. 334, 338 (1988) (citing ***Data Disc, Inc. v. Systems Tech. Assocs., Inc.***, 557 F.2d 1280, 1285 (9th Cir. 1977)). If the undisputed facts reveal any possible basis on which the non-moving party might prevail, the court must deny the motion. ***Scheuer***, 416 U.S. at 236; ***Lewis v. United States***, 32 Fed. Cl. 59, 62 (1994). If, however, the motion challenges the truth of the jurisdictional facts alleged in the complaint, the court may consider relevant evidence in order to resolve the factual dispute. ***Rocovich v. United States***, 933 F.2d 991, 994 (Fed. Cir. 1991); ***Lewis***, 32 Fed. Cl. at 62.

II. Jurisdiction

This court has jurisdiction over suits founded on 29 U.S.C. § 206 under the Tucker Act, 28 U.S.C. § 1491, which provides that the "Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the

Constitution, or any Act of Congress...." 28 U.S.C. § 1491(a)(1).

The subject matter jurisdiction of the court is narrowed, however, by 28 U.S.C. § 1500. Section 1500 creates an exception to the general Tucker Act jurisdiction and states, in part, that the court "shall not have jurisdiction of any claim for or in respect to which the plaintiff...has pending in any other court any suit or process against the United States...."

Defendant relies on § 1500 in support of its motion, arguing that plaintiff's EPA claim was filed with the court while the same claim was pending in the District Court.[3] Defendant argues further that, despite plaintiff's transfer of the EPA count of its complaint from the District Court to this court, the counts that remained with the District Court were the same for the purposes of § 1500.

A. Timing Under § 1500

To begin, although final judgment on the pending claims has now been rendered by the District Court, the relevant date is not today but plaintiff's date of filing. ***UNR Industries, Inc. v. United States***, 962 F.2d 1013, 1021 (Fed. Cir. 1992). Notwithstanding the fact that plaintiff's District Court filing was nearly 10 months prior to her filing in this court, plaintiff contends that 28 U.S.C. § 1631 cures any alleged jurisdictional problem arising from the date of filing.

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[3] Reply To Plaintiff's Response In Opposition To Defendant's Amended Complaint (Def.'s Reply) at 2-3.

Section 1631 governs the transfer of claims among courts for want of jurisdiction. The statute states in pertinent part:

> Whenever a civil action is filed in a court...and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action...to any other such court in which the action...could have been brought at the time it was filed...and the action...shall proceed as if it had been filed in...the court to which it is transferred on the date upon which it was actually filed in...the court from which it is transferred.

28 U.S.C. § 1631.

Plaintiff argues, therefore, that her claim was not "pending" in the District Court when she filed her EPA claim in this court. As a matter of fact, plaintiff's claim was filed with this court on December 18, 2002, whereas her initial claims were filed with the District Court on February 27, 2001. By operation of § 1631, however, the court agrees that plaintiff's EPA claim should be deemed filed on February 27, 2001.

Establishing an earlier date of filing, however, does not resolve the question of jurisdiction. For reasons discussed below, the claims filed in the District Court and the EPA claim filed in this court are substantially the same. At best, the earlier filing date allows plaintiff's claims to be considered as filed simultaneously.

Plaintiff acknowledges that "[w]here the claims in the two cases are identical, [§ 1500] applies when a plaintiff elects to pursue a claim in another court prior to filing"[4] in this court. Conversely, precedent supports the proposition that this court retains jurisdiction over a claim subsequently filed in another court. ***Tecon Eng'r, Inc. v. United States,*** 170 Ct. Cl. 389, 394 (1965).[5] Where claims are filed simultaneously, however, "§ 1500 requires a comparison between the claims raised in the Court of Federal Claims and in the other lawsuit." ***Keene Corp. v. United States,*** 508 U.S. 200, 210 (1993).

In ***United States v. County of Cook,*** 170 F.3d 1084 (Fed. Cir. 1999), the United States Court of Appeals for the Federal Circuit (Federal Circuit) ruled on whether claims deemed to be filed simultaneously in the United States Court of Federal Claims and a district court were "pending." ***Id.*** at 1089. The Federal Circuit stated, "the 'filing' of the same claim simultaneously in the district court and the United States Court of Federal Claims by operation of § 1631 deprives the latter court of jurisdiction pursuant to § 1500." ***Id.*** at 1091.

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[4] Pl.'s Response at 7 (citing ***Seaman, Inc. v. United States,*** 5 Cl. Ct. 386, 390-91 (1984)).

[5] ***Tecon*** was expressly overruled by ***UNR Indus., Inc. v. United States,*** 962 F.2d 1013, 1022 (Fed. Cir. 1992). Nonetheless, it was rehabilitated for limited fact circumstances by ***Keene Corp. v. United States,*** 508 U.S. 200, 216 (1993), in which the United States Supreme Court considered ***UNR*** and found it "unnecessary to consider, much less repudiate...***Tecon Engineers*** [or] ***Casman.***"

This judgment reflects the purpose underlying § 1500, which is to require that plaintiffs choose one court in which to pursue their claim, thereby protecting the United States against having to defend two lawsuits over the same matter simultaneously. ***Spodek v. United States***, 44 Fed. Cl. 32, 36 (1999) (citing ***Johns-Manville Corp. v. United States***, 855 F.2d 1556, 1564 (Fed. Cir. 1988)). Assuming plaintiff's EPA claim was the "same" claim as that filed in the District Court, it must be regarded as pending for the purposes of § 1500. An analysis of the "sameness" of those claims follows.

B. Same Claim

"Deciding if the claims are the same or distinctly different 'requires a comparison between the claims raised in the Court of Federal Claims and in the other lawsuit.'" ***Loveladies Harbor, Inc. v. United States***, 27 F.3d 1545, 1549 (Fed. Cir. 1994) (quoting ***Keene***, 508 U.S. at 210). "For the Court of Federal Claims to be precluded from hearing a claim under § 1500, the claim pending in another court must arise from the same operative facts, and must seek the same relief.... [A] showing that the two claims arose from the same 'operative facts' is necessary, but not sufficient, to preclude the Court of Federal Claims from hearing a case. To come within the proscription of § 1500, the claims must also seek the same relief." ***Loveladies Harbor***, 27 F.3d at 1551-52 (emphasis omitted).

In analyzing a claim, the court looks to the set of operative facts alleged and not the legal theory that is argued. ***Johns-Manville***, 855 F.2d at 1563. In other

words, "it is 'operative facts' and not legal theories by which claims may be distinguished . . . ." ***Loveladies Harbor***, 27 F.3d at 1549. Further, the operative facts pleaded need not be identical. It is sufficient that they are substantially the same. ***Keene***, 508 U.S. at 212.

Just as the operative facts need not be identical for a claim to be the same, neither does the relief sought. The relief must merely be the same in nature: monetary, injunctive, or declaratory. It is enough that there is some overlap in the relief requested, ***id.*** at 201, although § 1500 will not preclude jurisdiction where the relief sought is entirely different. ***Casman v. United States***, 135 Ct. Cl. 647, 648 (1956).[6]

i. Same Operative Facts Alleged

Plaintiff's EPA claim consists of a subset of the same factual allegations as her broader District Court case. Plaintiff pleads, for instance, the following facts to support not only her EPA claim but also the broader claims filed in the District Court: defendant was paying male employees higher wages than plaintiff for work which required equal skill, effort, and responsibility, and which was performed under similar working conditions;[7] defendant failed to properly grade and classify plaintiff's work and compensate her at the

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[6] In ***Casman*** only injunctive relief was sought in a district court and only monetary relief was sought at the United States Court of Claims. See *infra* note 5, regarding ***Casman's*** status as precedent.

[7] Amended Compl. ¶ 14; Def.'s Reply, attachment A (copy of Plaintiff's Amended Complaint filed at the District Court), ¶ 50b.

appropriate rate;[8] defendant failed to advance plaintiff to the GS-11 or GS-12 level.

Although it is true that plaintiff has advanced different legal theories in this court than those put forward in her District Court complaint, this does not distinguish the claims from one another for the purposes of § 1500. ***Johns-Manville***, 855 F.2d at 1563. "The operative facts do not need to support the same legal theories in order to be similar." ***Marshall Assoc. Contractors, Inc. v. United States***, 31 Fed. Cl. 809, 813 (1994).

Plaintiff argues that certain facts in her original complaint applied to the Title VII claims, whereas others applied to the EPA claims. All facts, plaintiff avers, had to be included in the original complaint filed with this court by the rules of transfer, but an amended complaint has cured the duplication. Plaintiff contends that the EPA claim at issue is not merely a subset of the facts at issue in the District Court, but that certain facts and claims have been carved out of her original suit and transferred here. Despite plaintiff's assertion, however, the operative facts of both the case filed in this court and the case filed in the District Court are overlapping. No matter how one parses the complaints, the same alleged discrimination on the basis of sex is at the root of the instant case and at least the Title VII component of the District Court case.

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[8] Amended Compl. ¶¶ 11-13; Def.' s Reply, attachment A, ¶ 50a.

ii. Same Relief Sought

There is likewise a substantial overlap in the relief requested from both courts. Plaintiff seeks injunctive and declaratory relief only in the district court, but seeks monetary relief from both.[9]

Unlike ***Casman***, where plaintiff was seeking "entirely different" relief, here the monetary damages requested from the court could have been awarded by the District Court, at least in effect, as part of plaintiff's damages. Both elements of the test described in ***Loveladies Harbor*** are met and, therefore, plaintiff's claims are the same under § 1500. Accordingly, the court lacks jurisdiction to hear plaintiff's EPA claim.

iii. Manifest Injustice

The court understands plaintiff's contention that dismissal of her complaint would result in "manifest injustice." Since this court has exclusive jurisdiction over monetary claims in excess of $10,000 against the United States, 28 U.S.C. § 1491, plaintiff argues that she is deprived of any forum to redress her EPA claim.[10] Plaintiff asserts that her case was mishandled by prior counsel and, but for such mistakes, her case would have been brought to the proper forum.

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9 Amended Compl. at 3-4; Def.'s Reply, attachment A, at 11-12.

10 Pl.'s Response to Def.'s Mot. at 13.

Nevertheless, plaintiff's District Court case was filed. If plaintiff were allowed to litigate the same claim again, she would have a choice of fora to pursue her claim against the United States, and the United States would have to defend two lawsuits over the same matter.

More fundamentally, however, "courts have no authority to reach the merits of a case in the absence of subject matter jurisdiction, even if they perceive it to be 'in the interest of justice' to do so....[Courts] must abide by the 'age-old rule that [they] may not in any case, even in the interest of justice, extend [their] jurisdiction where none exists.'" ***UNR Industries***, 962 F.2d at 1025 (quoting ***Christianson v. Colt Indus. Operating Corp.***, 486 U.S. 800, 818 (1988)).

Conclusion

For the above-stated reasons, Defendant's Motion To Dismiss is GRANTED. The Clerk is directed to dismiss plaintiff's complaint. No costs.

IT IS SO ORDERED.

/s/
BOHDAN A. FUTEY
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

BONNIE HARBUCK,

Petitioner,

v.

DR. LAWRENCE J. DELANEY,
Acting Secretary of the Air Force,

Respondent.

Civil Action No. 5:01-CV-91-4 (HL)

ORDER

[ENTERED: AUGUST 6, 2002]

Petitioner's Motion to Transfer [Tab 13] having been filed on March 2, 2002, the Court hereby grants Petitioner's Motion and enters the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

Petitioner is employed with the Department of the Air Force and works at the Warner Robins Air Logistics Center. Petitioner is also a member of a bargaining unit represented by the American Federation of Government Employees (AFGE). The AFGE has negotiated a grievance procedure with the

employer that affords members an avenue to pursue personnel complaints. Following a series of events, including Petitioner's non-selection for a WG-12 Circuit Maker's position, Petitioner initiated Equal Employment Opportunity (EEO) counseling concerning a lowering of her Civilian Performance and Promotion Appraisal from the previous year's rating. A grievance meeting was held and a settlement reached, whereby Petitioner's rating was restored to the level of the previous year. Petitioner's position was later classified as Computer Assistant, GS-335-07. After the classification of the position, and other events, Petitioner contacted an EEO counselor, the ultimate result of which was the filing of a formal complaint with the EEO on September 18, 1999. Petitioner alleged sexual discrimination as the sole basis for that complaint. Petitioner filed a second formal complaint with the EEO on November 19, 1999 alleging sexual discrimination, age discrimination, and reprisal as the basis for that complaint. Petitioner did not allege a violation of the Equal Pay Act in either of the two formal complaints that she filed with the EEO. Also, Petitioner has not pursued an Equal Pay Act claim through the collective bargaining agreement grievance procedure.

Petitioner filed a complaint in this Court on February 27, 2001. She filed an amended complaint on March 1, 2001. In both the original and the amended complaints Petitioner alleged violations of Title VII, the Equal Pay Act (EPA), and the Privacy Act. Also, in both the original and the amended complaints, Petitioner prayed for monetary relief in the amount of the difference between what Petitioner actually earned as

classified and what Petitioner would have earned at a GS-12 classification. Petitioner also prayed for monetary relief in liquidated damages in an amount equal to that awarded for back pay, for three hundred thousand dollars compensatory damages for emotional pain and suffering, and for attorney's fees and costs of litigation.[11] The Respondent timely filed its answer to Petitioner's complaint on May 7, 2001. In numbered defense fourteen, Respondent asserted that because Petitioner seeks recovery of more than ten thousand dollars under the EPA, exclusive subject matter jurisdiction for that count rests properly in the Federal Court of Claims. Also, in the "Alleged Jurisdiction" section of Respondent's answer, Respondent again stated that the United States District Court does not have jurisdiction to hear Petitioner's EPA claim.

Following a change of counsel, Petitioner filed a Motion to Transfer the EPA count (Count II)[12] of her complaint to the Federal Court of Claims.

II. CONCLUSIONS OF LAW

In its Response to Petitioner's Motion to Transfer, Respondent initially contended that according to Carter

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[11] In the original and amended complaint, Petitioner did not specify the amount sought for monetary relief under the EPA claim. Respondent, in its answer, treated the claim as being in excess of ten thousand dollars. As neither party has disputed this contention, the Court will likewise treat Petitioner's EPA claim as one in excess of ten thousand dollars.

[12] Petitioner's complaint sets forth two Count IIs. The claim that is the subject of the Motion to Transfer is contained in the first Count II.

v. Gibbs, 909 F.2d 1452 (Fed. Cir. 1990), the Federal Court of Claims has no jurisdiction to hear Petitioner's EPA claim. Respondent then acknowledged a split in authority within the Federal Court of Claims regarding what effect a subsequent amendment had on the Carter decision. Respondent entreated the Court to adopt the line of reasoning espoused by Addison-Taylor v. United States, 51 Fed. Cl. 25 (Fed. Cl. 2001) and O'Conner v. United States, 50 Fed. Cl. 285 (Fed. Cl. 2001), in which those courts held that the Carter decision remains viable law. Respondent then asserted that although Petitioner had the option to file an EPA claim as an EEO complaint or pursuant to the collective bargaining agreement's grievance procedure, Petitioner could not initiate an EPA claim in the Court of Federal Claims. The Court will address each of these contentions in turn.

A. Carter v. Gibbs

Respondent asserted that because of the decision in Carter, and the subsequent cases upholding Carter, Petitioner does not have the option to pursue her EPA claim in the Federal Court of Claims. In Carter, the Plaintiffs, IRS employees, were members of a collective bargaining unit that had negotiated a grievance procedure with the employer, Internal Revenue Service, as directed by 5 U.S.C.A. § 7121(a). Carter, 909 F.2d at 1453. The Plaintiffs brought suit against the employer for violations of the Fair Labor Standards Act (FLSA), 29 U.S.C.A. § 207, concerning overtime pay. Id. The court first recognized the limiting procedural effects that the Civil Service Reform Act (CSRA), 5 U.S.C.A. §

7121(a)(1), had on the FLSA. Id. The court then quoted the relevant portion of the code section:

> "[e]xcept as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d) and (e) of this section, *the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.*"

Id. (quoting 5 U.S.C.A. § 7121(a)(1) (1978)). The court then noted that all the parties agreed that the employees' disputes did not fall within the exceptions noted in § 7121(a)(1). Id. The court also stated that the type of dispute, overtime pay, was not excluded by the collective bargaining agreement grievance procedure. Id. Due to these findings, and due also to the finding that the CSRA did not implicitly provide for an exception to its "exclusivity provision," the court ruled that the employees were barred from bringing suit in federal district court. Id. at 1454-55.

However, the Carter court noted that "Congress excepted from section 7121(a)(1)'s exclusivity rule only one aspect of the FLSA: the Equal Pay Act, 29 U.S.C. § 206(d), which is now under section 7121(d)." Id. at 1455. As Carter dealt with a claim subject to § 7121(a)(1), Respondent's reliance on Carter for the proposition that the CSRA prevents an EPA claim from being filed in a federal court, is mistaken. Likewise, Respondent's reliance on subsequent cases that assert that the

holding in Carter survived a 1994 amendment to 5 U.S.C.A. § 7121(a)(1) is beside the point. Even should the Court agree with Respondent's contention that Carter remains viable, that conclusion would not affect the disposition of the Motion to Transfer.

Petitioner seeks to transfer her EPA claim, a claim recognized by Carter as being subject to the provisions of 5 U.S.C.A. § 7121(d). Section 7121(d) states that an employee may pursue certain grievances, including an EPA violation, through either the collective bargaining grievance procedure, if encompassed within the grievance procedure, or a statutory procedure "but not both." As Petitioner did not elect to pursue her EPA claim through the grievance procedure negotiated by the AFGE, she was free to pursue the claim by utilizing a statutory procedure. The question of what statutory options were available to Petitioner implicates Respondent's second argument, that Petitioner could have pursued her EPA claim through an EEO procedure but not, at least directly, in the Federal Court of Claims.

B. Statutory grievance procedure options for Petitioner's EPA claim

Respondent contends that Petitioner could have pursued her EPA claim through the collective bargaining agreement procedure or through an EEO procedure, but not both. Respondent is correct in its contention, inasmuch that had Petitioner pursued her EPA claim through the EEO, she would not have been able to pursue the claim through the negotiated procedure and vice versa. However, Respondent is

mistaken in its contention that Petitioner cannot directly bring an EPA action in the Federal Court of Claims.

An aggrieved employee may maintain an EPA claim "in any Federal or State court of competent jurisdiction." 29 U.S.C.A. § 216(b) (1998). Unlike a claim made pursuant to Title VII, employees pursuing an EPA claim are not required to first file a complaint with an administrative agency such as the EEO. *See* County of Washington v. Gunther, 452 U.S. 161, 175 n.14 (1981); Miranda v. B & B Cash Grocery Store, Inc., 975 F.2d 1518, 1527 (11th Cir. 1992); 29 C.F.R. § 1614.408 (2001). Thus, despite not filing with the EEO, Petitioner was at liberty to file her EPA claim in a federal court of competent jurisdiction.

United States district courts have jurisdiction, concurrent with the United States Court of Federal Claims, of any civil action founded upon any act of Congress, not exceeding $10,000 in amount and brought against the United States. 28 U.S.C.A. § 1346(a)(2)(1993). The United States Court of Claims also has jurisdiction of any claim against the United States based upon an act of Congress, but without the $10,000 jurisdictional limit. 28 U.S.C.A. § 1491(a)(1) (1994 & Supp. 2001). Petitioner has filed suit against the United States Air Force pursuant to the EPA, an act of Congress, seeking monetary relief in excess of $10,000. Therefore, the United States District Court does not have jurisdiction over Petitioner's EPA claim as pleaded. Rather, the United States Court of Federal Claims has jurisdiction over Petitioner's EPA claim as pleaded.

III. CONCLUSION

The Court finds that it is in the interest of justice to transfer the Equal Pay Act count of Petitioner's complaint (Count II) to the United States Court of Federal Claims. In view of the foregoing, Petitioner's Motion to Transfer the Equal Pay Act count of her complaint is granted.

SO ORDERED this the 5 day of August, 2002.

/s/
HUGH LAWSON, JUDGE

bdc

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ORDER

[ENTERED: OCTOBER 15, 2004]

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same is, DENIED.

The mandate of the court will issue on October 22, 2004.

FOR THE COURT

/s/
Jan Horbaly
Clerk

Dated: October 15, 2004

cc: Bonnie Michelle Smith
William F. Ryan

HARBUCK V. US, 04-5013
(CFC - 02-CV-1829)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

28 U.S.C. § 1500

§ 1500. Pendency of claims in other courts

The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

28 U.S.C. § 1500

§ 1500. Pendency of claims in other courts

The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

No. 04-959

Supreme Court, U.S.
FILED
MAR 16 2005
OFFICE OF THE CLERK

In The Supreme Court of the United States

BONNIE HARBUCK,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR REHEARING

Bonnie Harbuck
Post Office Box 7126
Warner Robins, Georgia 31095
(478) 953-7229

Petitioner Pro Se

THE LEX GROUP^{DC} ♦ 1750 K Street, NW ♦ Suite 475 ♦ Washington, DC 20006
(202) 955-0001 ♦ (800) 815-3791 ♦ Fax: (202) 955-0022 ♦ www.thelexgroupdc.com

QUESTIONS PRESENTED

1. Whether 28 U.S.C. § 1500, as originally drafted in the 1800's, is unconstitutional?

RULE 29.6 STATEMENT AND INTERESTED PERSONS

Pursuant to Supreme Court Rule 29.6, petitioner states that it has no parent companies or non-wholly owned subsidiaries.

The following persons have an interest in the outcome of this litigation:

Bonnie Harbuck, United States.

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PETITION FOR A REHEARING

JURISDICTION

The court of appeals' judgment was decided on August 10, 2004. A timely request for a combined petition for rehearing and petition for rehearing en banc was denied on October 15, 2004. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1). A petition for certiorari was denied on February 22, 2005. Pursuant to Supreme Court Rule 44, petitioner requests a rehearing.

STATUTORY PROVISION INVOLVED

28 U.S.C. § 1500 provides: "The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States."

REASONS FOR GRANTING THE REHEARING

28 U.S.C. § 1500 is unconstitutional. It was unconstitutional back in the 1800's when the statute was enacted. The statute was drafted to avoid duplicitous litigation after the civil war with the cotton claimants who lost their cotton. The Southerners would sue in a variety of courts under differing theories of law for redress for the loss of their cotton

crops. So, in the 1800's Congress passed §1500 legislation to end these lawsuits. Yet the law was unconstitutional. 28 U.S.C. § 1500 as written has always been unconstitutional.

The statute is unconstitutionally vague and ambiguous. The statute has no procedural safeguards to protect against some suits against the government that are similar but are not really the same. The statute does not address special provisions for differing remedies. The statute does not address cases that are transferred. A host of problems are not specifically addressed in this statute, thereby making the statute unnecessarily vague and ambiguous. The statute as written is unconstitutional.

In the 1800's it was unconstitutional to broadly take away rights to the cotton claimants when no such other law took away the rights for more than one suit at a time for other claimants. A person could sue a private individual in a variety of courts, and there was no law prohibiting those types of duplicitous suits. Merely, suits against the government in multiple forums were prohibited.

Cases against private individuals that are the same cases are not protected under this legislation. A Southerner could sue another Southerner for a loss that occurred during the 1800's in two different forums at the same time and yet § 1500 does not protect him. That was unconstitutional. The statute is still unconstitutional today.

The statute is unconstitutional, and it has been for well over 100 years. Isn't it time to address that fact now? 28 U.S.C. § 1500 is unconstitutional.

CONCLUSION

The petition for rehearing should be granted. 28 U.S.C. § 1500 is an antiquated statute from the civil war that has always been unconstitutional.

Respectfully submitted,

Bonnie Harbuck

Bonnie Harbuck
P.O. Box 7126
Warner Robins, GA 31095